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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/088,097	07/03/2002	Daniel Daviller	P67745US0	5018
136	7590	11/30/2004	EXAMINER	
JACOBSON HOLMAN PLLC 400 SEVENTH STREET N.W. SUITE 600 WASHINGTON, DC 20004			SAYALA, CHHAYA D	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 11/30/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/088,097

Applicant(s)

DAVILLER, DANIEL

Examiner

C. SAYALA

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09 September 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 03 July 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Specification*

Applicant is reminded that the Content of Specification should contain the following when Figures are presented in the application:

- (g) Brief Description of the Several Views of the Drawing(s): See MPEP § 608.01(f).

A reference to and brief description of the drawing(s) as set forth in 37 CFR 1.74.

### ***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-3 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Aylen et al. (US Patent 5782951).

The patent teaches a mixture of urea and cement wherein the cement contains 2.9% MgO and 64.3% CaO. The particles are between 1.4 and 3.6 mm. See col. 3,

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lines 1-26. The carbon dioxide content is not given and this office is not equipped to manufacture prior art products to that they can be compared with the claimed product in order to measure their physical characteristics in order to distinguish them for patentability purposes. It is for this reason that the rejection is being made under both statutes and the burden is being shifted to applicant to show that the prior art product is different. See *In re Swinehart*, 439 F.2d 210, 169 USPQ 226, (CCPA 1971); *In re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

3. Claims 1-3 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Van Mao (US Patent 5082488).

Van Mao teaches a composition containing MgO, 0.1 to 10% by weight and CaO, 10-25% by weight and plant nutrient components such as potassium and ammonium. The carbon dioxide content is not given and this office is not equipped to manufacture prior art products to that they can be compared with the claimed product in order to measure their physical characteristics in order to distinguish them for patentability purposes. It is for this reason that the rejection is being made under both statutes and the burden is being shifted to applicant to show that the prior art product is different. See *In re Swinehart*, 439 F.2d 210, 169 USPQ 226, (CCPA 1971); *In re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980). The size of chrysotile particles are known to have a size that coincides with those claimed. See PTO-892 form.

4. Claims 1-3 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Hollingsworth (US Patent 3791810).

See claim 1 which teaches a mixture of ammonium polyphosphate and dolomite and calcium oxide, 5-35% by weight. See also col. 2, lines 35-40. The particle size is given at line 57. The carbon dioxide content is not given and this office is not equipped to manufacture prior art products to that they can be compared with the claimed product in order to measure their physical characteristics in order to distinguish them for patentability purposes. It is for this reason that the rejection is being made under both statutes and the burden is being shifted to applicant to show that the prior art product is different. See *In re Swinehart*, 439 F.2d 210, 169 USPQ 226, (CCPA 1971); *In re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

5. Claims 1-3 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over JP 55099992.

The patent teaches a composition with 35-45% CaO and 3-7% MgO with K<sub>2</sub>O, P<sub>2</sub>O<sub>5</sub> and N containing fertilizers. See abstract. The size or the carbon dioxide content is not given and this office is not equipped to manufacture prior art products to that they can be compared with the claimed product in order to measure their physical characteristics in order to distinguish them for patentability purposes. It is for this

reason that the rejection is being made under both statutes and the burden is being shifted to applicant to show that the prior art product is different. See *In re Swinehart*, 439 F.2d 210, 169 USPQ 226, (CCPA 1971); *In re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

6. Claims 1-4, 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Judd (US Patent 4410350).

Judd describes a fertilizer with NPK ingredients, diammonium phosphate, potash, etc. that also contains at least 2% of calcium, magnesium or both, in the form of the oxide. See col. 3, lines 15-25. Amounts of fertilizer components are generally based on the soil quality and plant requirements and to fathom such would have been obvious to the skilled worker at the time the invention was made. See claim 1, which teaches the size, minus six plus thirty mesh size. The carbon dioxide content is not given and this office is not equipped to manufacture prior art products to that they can be compared with the claimed product in order to measure their physical characteristics in order to distinguish them for patentability purposes. The burden is being shifted to applicant to show that the prior art product is different. See *In re Swinehart*, 439 F.2d 210, 169 USPQ 226, (CCPA 1971); *In re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980). To meter together amounts from an hopper is a common method to combine two ingredients and this would have been obvious to one of ordinary skill in the art at the time the invention was made.

7. Claims 1-6, 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 2706077.

The reference teaches granulating a mixture of potassium chloride, and phosphate mixed with magnesium oxide and calcium oxide. The amount is described as being sufficient to form diphosphates of calcium and magnesium and such disclosure would render obvious monocalcium phosphates also since these are known fertilizer compounds. The carbon dioxide content is not given and this office is not equipped to manufacture prior art products to that they can be compared with the claimed product in order to measure their physical characteristics in order to distinguish them for patentability purposes. The burden is being shifted to applicant to show that this is different. The size is not given, however it would have been obvious to granulate them to a size that would average a conventional fertilizer granulated product, which would fall within the claimed range. To meter together amounts from an hopper is a common method to combine two ingredients and this would have been obvious to one of ordinary skill in the art at the time the invention was made.

### ***Response to Arguments***

8. Applicant's arguments filed 9/9/2004 have been fully considered but they are not persuasive.

Applicant's arguments center around instant claim 2: that the products of the references contain a carbon dioxide content above 4%. Applicant contends that the

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CaO of the references are therefore, not "true" CaO. First, claim 1 does not contain any such limitation. Second, applicant has chosen to describe his product with physical characteristics that cannot be measured for comparison purposes because the Office is not equipped to manufacture prior art products and compare them with the instant claims. Further, it is well established that attorney's arguments do not take the place of evidence. In re Cole, 326 F.2d 769, 773, 140 USPQ 230, 233 (CCPA 1964). The references teach the same elements in the same amounts. With regard to the Van Mao patent, applicant has stated that the calcium "might not be as CaO" because "washing is carried out". While it is true that the washing is carried out, the product from that washing is dried. See example 4 for instance. Note the final analysis of the solid given at col. 5, lines 15-25. Applicant's conjecture that Van Mao's product may not be CaO, does not appear to be correct based on the patentee's description of the product. Applicant's statement that the final product of Van Mao "is expressed as  $\text{CaCO}_3$ " could not be found in the patent. The rejections are being maintained.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA whose telephone number is 571-272-1405.



The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



C. SAYALA  
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